Petition

Supreme Court, U.S.
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NO. 81-1757

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JOEL D. JOSEPH, et al.,

Petitioners,

v.

J. LYNN HELMS, Administrator,
Federal Aviation Administration, et al.

Respondents.

PETITION FOR A WRIT OF CERTIORI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Can the United States gain an avigation easement by adverse possession when it denies that there are aircraft overflights above the property in question?

2. When does the statute of limitations begin to run concerning a claim that aircraft overflights have taken property without just compensation in violation of the Fifth Amendment, when the airport operator's intentions to take a permanent easement are not known or ascertainable?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners respectfully request that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia entered in this preceeding on December 16, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals has not been reported and is reproduced as Appendix A. The opinion of the United States District Court for the District of Columbia is reported at 507 F. Supp. 453 (1981), and is reproduced as Appendix B.

JURISDICTION

This petition for a writ of certiorari was filed within 90 days of the date that the Court of Appeals issued its decision. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Can the United States gain an avigation easement by adverse possession when it denies that there are aircraft overflights above the property in question?

2. When does the statute of limitations begin to run concerning a claim that aircraft overflights have taken property without just compensation in violation of the Fifth Amendment, when the airport operator's intentions to take a permanent easement are not known or ascertainable?

CONSTITUTIONAL PROVISIONS INVOLVED

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

No person shall be . . . life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Petitioners purchased a home under one of the flight paths to Washington National Airport in 1973. Before making this purchase petitioners (1) searched the land records of the District of Columbia and found no recorded easement for aircraft overflights, and (2) inspected the property on several occasions and observed no overflights.[1]

Since 1972 the United States Department of Transportation and the Federal Aviation Administration have been seeking to establish a policy for the use of Washington National Airport. See 46 Fed. Reg. 36069

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1 These facts were sworn to by affidavit and the respondent has not denied that they are true.

(July 13, 1981). The respondents have, at all times, denied that there are overflights above petitioners' property. 507 F. Supp. at 454. App. 5a.

Respondents have maintained that the flight paths to Washington National Airport, and the types of aircraft using the airport, have remained essentially constant since 1966.

Petitioners filed suit in the United States District Court for the District of Columbia in 1978 alleging, inter alia, that the overflights constituted a taking of property under the Fifth Amendment because the flights were so low and so frequent that petitioners have been deprived of peaceful use and possession of their property.

Respondents, and the court below, contend that if a taking occurred it was a taking from the prior owner of the property and not from petitioners.

Petitioners contend that the taking did not occur until the intentions of the government are known or ascertainable. And even if the government's intentions are known or ascertainable, and the government gains title to an easement by adverse possession, that

it must record this easement to put future owners on notice. Without notice petitioners bought the land without an easement, and therefore the current overflights constitute a taking of property to which they are entitled to just compensation.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals permits the Federal Government to take property by inverse comdemnation without compensating either the present or past homeowners. The very evil sought to be curbed by the Fifth Amendment, that of the Federal Government trampling private property rights of ordinary citizens, has been rubber stamped by the Court of Appeals.

I. THE DECISION OF THE CIRCUIT COURT IS IN CONFLICT WITH THE DECISION OF THE SUPREME COURT IN UNITED STATES v. DICKINSON, 331 U.S. 745 (1947).

This court ruled that a cause of action for a taking of private property does not accrue until conditions have reached the state where the extent of the government's use of and interference with the

property is known or ascertainable. United States v. Dickinson, 331 U.S. 745 (1947).

The extent of the Federal Government's future use of Washington National Airport is not fully known or ascertainable even as of the date that this brief is filed. The Federal Aviation Administration recently stated:

> For approximately ten years, the U.S. Department of Transportation and the FAA have been seeking to establish an appropriate policy to guide the management and operation of Washington National and Dulles International Airports. Once a role for each airport, in meeting the Washington metropolitan area's air transportation needs is clearly defined, it will be possible for the FAA to move ahead with necessary improvements to the facilities at Washington National while continuing to make timely improvements to Dulles. An understanding of the role of each airport is necessary to assure that the investment in improvements and management of present facilities are consistent with the area's needs.

46 Fed. Reg. 36069 (July 13, 1981).

The Government's intention concerning use of airspace over plaintiff's homes is less than ascertainable. In United States v. Dickinson, supra, the Supreme Court ruled that the statute of limitations does not begin to run concerning a Fifth Amendment taking claim until the extent of the "taking" is certain and final. Justice Frankfurter, writing for the court ruled:

> The Government could, of course, have taken appropriate proceedings to condemn as early as it chose land and flowage easements. By such proceedings it could have fixed the time when the property was "taken". The Government chose not to do so. It left the taking to physical events, thereby putting on the owner the onus of determining the decisive moment in the process of acquisition by the United States when the fact of taking could not longer be in controverst. 331 U.S. at 747, 748.

The Dickinson case involved a process of flooding private lands over a period of years. The instant case involves the continued use of private property for aircraft overflights.

Justice Frankfurter continued:

> The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding "causes of action" when they are born, whether they proliferate, and when they die.
>
> * * *
>
> The source of the entire claim -- the overflow due to rises in the level of the river -- is not a single event; it is continuous. And as there is nothing in reason, so there is nothing in legal doctrine, to preclude the law from meeting such a process by postponing suit until the situation becomes stabilized. An owner of lnd flooded by the government would not unnaturally postpone bringing a suit against the Government for the flooding until the consequences of inundation have

> so manifested themselves that a final account may be struck.
>
> 331 U.S. at 748, 749.

Petitioners have suffered from a continuous flood of aircraft noise. They have postponed suit until the depth of the flood manifested itself and they began drowning in the tide that has devastated the use of their property. Under Dickinson the statute of limitations does not bar petitioners from proceeding to prove their damages.

II. THE DECISION OF THE CIRCUIT COURT IS IN CONFLICT WITH THE DECISION OF THE UNITED STATES COURT OF CLAIMS IN KLEIN V. UNITED STATES, 152 Ct. Cl. 221, cert. denied, 366 U.S. 436 (1961).

The Court of Claims, in Klein v. United States, 152 Ct. Cl. 221, cert. denied, 366 U.S. 436 (1961), applied the principles of Dickinson, supra, to aircraft overflights. The Court of Claims stated:

> we do not think that the extent of the easement of flight had

> been ascertained when jets first began to fly over plaintiff's property. 152 Ct. Cl. at 223.

The Court below ruled that the government had acquired an easement in 1966 when jets first began to use National Airport. This holding is directly contrary to the ruling of the Court of Claims in Klein and a writ of certiorari should therefore issue to resolve this important issue.

III. THE DECISION OF THE CIRCUIT COURT IS IN CONFLICT WITH THE DECISION OF THE SUPREME COURT OF WASHINGTON IN PETERSEN V. PORT OF SEATTLE, 618 P. 2d 67, 94 Wash. 2d 479 (En Banc, 1980).

The Supreme Court of Washington recently ruled that there is no statute of limitations for filing a constitutional claim for a taking of property by aircraft overflights. Petersen v. Port of Seattle, 618 P. 2d 67, 94 Wash. 2d 479 (En Banc, 1980).

The court stated:

> entities clothed with the power of eminent domain should not be

> permitted to acquire the property of a private citizen by adverse possession and thus avoid payment of just compensation.
>
> 618 P. 2d at 71.

The court in Petersen added:

> Because of taking or damaging of plaintiffs' property is of constitutional magnitude, mere passage of time alone does not bar plaintiffs' cause of action.
>
> 618 P. 2d at 69.

Because aircraft overflights involves interstate commerce there should be uniform national standard regarding compensation for these overflights. Otherwise, certain airports which do not have to compensate landowners, will have an unfair competitive advantage which will interfere with interstate air travel.

IV. CONCLUSION

Because this case involves important questions of Federal Constitutional law, and because hundreds of thousands of homeowners are effected by aircraft

overflights, certiorari should be granted to review the decision of the Court of Appeals.

Respectfully submitted,

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Appendix

Appendix A

UNITED STATES COURT OF APPEALS
For the District of Columbia
September Term, 1981
No. 81-1276
[Filed: December 16, 1982

Joel D. Joseph,
et al., Appellants

v.

J. Lynn Helms,
Administrator, Federal Aviation Administration, et al.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: TAMM, WALD and GINSBURG, Circuit Judges

Filed: December 16, 1981

J U D G M E N T

This case was considered on the record on appeal from the United States District Court for the District of Columbia and was briefed and argued by counsel. The issues presented have been accorded this court's full consideration; they occasion no need for an opinion. See D.C. Cir. R. 13(c).

No. 81-1276 -- Joseph v. Helms

Substantially for the reasons stated by the district court in its January 7, 1981 memorandum opinion, and as set forth in the accompanying memorandum, it is

ORDERED AND ADJUDGED that the judgment from which this appeal has been taken is affirmed.

Per Curiam

Memorandum

Appellants complain that their property has been taken for public use, in the form of an avigation easement, without just compensation. The property in question, purchased by appellant Joseph in 1973, is approximately 3.5 nautical miles north of Washington National Airport (WNA).

Compensation for a taking is due to the owner at the time of the taking, not to an owner who subsequently acquires the property. United States v. Dow, 357 U.S. 17, 20 (1958). The district court

No. 81-1276 -- Joseph v. Helms

pretermitted the question whether any taking had in fact occurred; it concluded that even if there had been a taking, appellants would not qualify for compensation because any arguable avigation easement in the airspace above their land existed before they acquired the property. This determination, made in response to the Government's motion for summary judgment, rests on statements of material facts, which appellants did not contest, set out in the Government's submission pursuant to Local Rule 1-9(h). These statements, documented by affidavits and exhibits, show that since appellant Joseph acquired the property no significant change has occurred in (1) the published flight paths to the north of WNA, (2) the number of flights into and out of WNA, and (3) the aircraft types operated by air carriers at WNA.

In the face of this uncontroverted submission, we cannot gainsay the district court's ruling that appellants failed to show a genuine issue for trial. See Fed. R. Civ. P. 56(e). It did not suffice for appellants to complain of existing

conditions or to assert generally that "[a]ircraft operations typically build up slowly over years and decades." Brief for Appellants at 6. It was incumbent upon them to set forth specific facts countering the Government's documented statements of "no significant change" from the period prior to appellants' ownership. See Smith v. Saxbe, 562 F.2d 729, 733 (D.C. Cir. 1977); E.P. Hinkel & Co. v. Manhattan Co., 506 F.2d 201, 205 (D.C. Cir. 1974); Tinden Financial Corp. v. Palo Tire Service, Inc., 596 F.2d 604, 607-08 (3d Cir. 1979).

Nor are appellants aided by the rule that the "purchaser of land burdened with an easement takes it free of such burden unless he had notice or knowledge, actual or contructive, of such easement." 2G. Thompson, Real Property §434, at 743 (1961). If indeed the flights were so low and frequent as to amount to a taking, see United States v. Causby, 328 U.S. 256 (1946), reasonably diligent inspection and inquiry would have revealed the pervasive interference.

Appendix B

Joel D. JOSEPH et al., Plaintiffs,
v.
Langhorne M. BOND et al., Defendants.

Civ. A. No. 78-960.

United States District Court,
District of Columbia.

Jan. 7, 1981

Homeowners brought action against government claiming that government had taken avigation easement and that they were entitled to eminent domain compensation. The District Court, Aubrey E. Robinson, Jr., J., held that the homeowners, who had purchased their property after the alleged aviagtion easement was taken, could not maintain the action against the government.

Order accordingly.

Eminent Domain 284

Homeowners, who purchased their property after alleged avigation easement was taken, could not maintain an action against the government for eminent domain

compensation.

Joel D. Joseph, Washington, D.C., for plaintiff.

Hubert M. Crean, Special Litigation Atty., Dept. of Justice, Washington, D.C., for defendant.

MEMORANDUM OPINION

AUBREY E. ROBINSON, Jr., District Judge.

Before the Court is Defendant's Motion for Summary Judgment in the above captioned case. Plaintiffs allege that Defendants direct air traffic over their residential property in such a manner as to constitute an inverse condemnation of that property. Plaintiffs seek compensation for the alleged taking of their property.[1] Defendants deny that a taking has occurred and argue in the alternative that if there was a taking, it occurred well before Plaintiffs acquired the subject property and thus,

1. The complaint claims damages of $9,999, the maximum amount within this Court's subject matter jurisdiction pursuant to 28 U.S.C. § 1346(a)(2) (1976).

Plaintiffs have no claim. The conclusion is unavoidable that landowners who did not own land at the time an avigation easement was taken may not maintain an action against the Government for eminent domain compensation. Defendants' motion is granted.

Plaintiffs are owners of property located at 1412 Foxhall Road, N.W., Washington, D.C., which is approximately 3.5 nautical miles north of Washington's National Airport. National Airport is owned and operated by Defendant Federal Aviation Administration. Plaintiffs maintain that aircraft taking off from and landing at National Airport overfly their Foxhall Road property at altitudes below 1,000 feet.[2]

Since Defendants control the arrival and departure of aircraft at National Airport and direct the flight paths, Plaintiffs contend that Defendants have taken a

2. Airspace in an urban area over an altitude of 1,000 feet is in the public domain. United States v. Causby, 328 U.S. 256, 263, 66 S.Ct. 1062, 1066, 90 L.Ed.2d 1206 (1946); 14 C.F.R. § 91.79 (1980).

so-called avigation easement by allowing flights below 1,000 feet over the Foxhall Road property. Plaintiffs rely on the avigation easement eminent domain principles enunciated in United States v. Causby, 328 U.S. 256, 66. S.Ct. 1062, 90 L.Ed. 1206 (1946).

Defendants deny that flights directly overfly Plaintiffs' property. Alternatively, Defendants argue that even if there is an avigation easement, Plaintiffs have not suffered substantial damages to their property as a result of such flights.[3] Defendants also maintain that even if an avigation easement exists, it was created well before Plaintiffs became owners of the Foxhall Road property and thus, they may not maintain an action for eminent domain compensation.

In their uncontested Local Rule

3. Plaintiffs purchased the subject property for $48,000 in 1973 and recently listed the property for sale at an asking price of $197,750. The assessed tax valuation of Plaintiffs' property rose from $22,000 in 1973 to it present valuation of $94,531.

1-9(h) Statement of Material Facts, which under the rule the Court must accept as true, Defendants state that the altitude, frequency, flights paths and noise of aircraft in the Foxhall Road area have not significantly changed since 1966. Plaintiff Joseph acquired his interest in the Foxhall Road property in 1973; Plaintiff Singer acquired her interest in the property in 1977. Thus, any taking in the form of an avigation easement occurred before Plaintiffs acquired the subject property.

The person entitled to compensation for a taking of property by the Government is the owner of the property at the time of the taking. Dow v. United States, 357 U.S. 17, 20, 78 S.Ct. 1039, 2 L.Ed.2d 1109 (1958). In this case, the Plaintiffs did not, either individually or jointly, have any proprietary interest in the Foxhall Road property in 1966, when the Government arguably took an avigation easement in the airspace above the land. See Lacey v. United States, 595 F.2d 614 (Ct.Cl. 1979). Without reaching the question of whether an avigation easement actually exists, this Court holds that Plaintiffs are barred from

pursuing this action since they were not the owners of the property at the time of the alleged taking.

Opposition

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OCTOBER TERM, 1981

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v.

J. LYNN HELMS, ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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FEDERAL AVIATION ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners seek review of the decision of the court of appeals that they have no valid claim for "just compensation" under the Fifth Amendment because the alleged "taking" occurred, if at all, before petitioners obtained their property.

In 1978, petitioners filed the instant suit in the United States District Court for the District of Columbia, alleging that aircraft flights over their residential property in Northwest Washington, D.C. emanating from Washington National Airport[1] had substantially impaired the use and enjoyment of their property and therefore constituted an avigation easement (Pet. App. 6a-7a). They claimed

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[1] Washington National Airport is federally-owned and is operated by the Federal Aviation Administration (FAA).

$9,999 in just compensation under the Fifth Amendment for this taking (*id.* at 6a & n.1).

The FAA moved for summary judgment on the ground that petitioners' property had not been "taken" because they had obtained their interests in the property in 1973 and 1977, but the alleged "taking"[2] must have occurred at some time prior to their ownership. This conclusion was based on the factual assertion that since 1966 "the altitude, frequency, flight path and noise of aircraft" over the area in which petitioners' property is located "have not significantly changed" (*id.* at 7a). Petitioners did not challenge this factual assertion.

The district court granted FAA's motion for summary judgment (Pet. App. 6a-8a). The court relied upon *United States* v. *Dow*, 357 U.S. 17, 20 (1958), for the proposition that "[t]he person entitled to compensation for a taking of property by the Government is the owner of property at the time of the taking" and found that petitioners were not the owners when the alleged easement was arguably taken (Pet. App. 8a).

The court of appeals affirmed (Pet. App. 1a-4a). It held that petitioners had failed to show any "significant change" in flight operations after they obtained their property that would justify finding a taking of their property under *Dow* (*id.* at 2a-4a). The court also rejected petitioners' claimed lack of notice, observing that if an avigation easement existed as defined in *United States* v. *Causby*, 328 U.S. 256 (1946), then a reasonable inspection or inquiry would have discovered the "pervasive interference" with the enjoyment of the property (Pet. App. 4a).

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[2]The FAA also denied the taking of any interest in petitioners' property, which is not located beneath any published flight path to or from National Airport (Pet. App. 6a-7a).

We respectfully submit that the petition for a writ of certiorari should be denied.

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MAY 1982

(1980) (en banc). But the burden on petitioners' property has remained unchanged since 1966.

The recent regulatory change in the operation of National Airport, relied upon by petitioners (Pet. 6), is irrelevant to this case. It does not show that the effect of flights on petitioners' property has been altered since 1966, which is what petitioners were required to prove in order to withstand the FAA's motion for summary judgment.

Indeed, the FAA's new rules, which are now final, 46 Fed. Reg. 58036 (1981) (to be codified at 14 C.F.R. Parts 93 and 159), make no change in flight paths, types or total number of aircraft using National Airport, but do reduce the number of air carrier operations per hour and impose a noise level-based curfew which permits only relatively quiet aircraft to operate between the hours of 10 p.m. and 7 a.m. See generally, 46 Fed. Reg. at 58037-58038.

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2. Petitioners argue (Pet. 5-12) that the court of appeals erred in concluding that the taking, if any, occurred in 1966 because they "have suffered from a continuous flood of aircraft noise" (Pet. 9). Petitioners' argument is, however, more colorful than it is colorable.

It is settled that just compensation under the Fifth Amendment is due only to the property's owner at the time of the taking. *United States* v. *Dow*, 357 U.S. 17, 20-21 (1958), citing *Danforth* v. *United States*, 308 U.S. 271, 284 (1939). Such unliquidated claims do not pass to subsequent purchasers of the property. *United States* v. *Dow, supra*, 357 U.S. at 20-21; *Lacey* v. *United States*, 595 F. 2d 614, 619 (Ct. Cl. 1979); Assignment of Claims Act of 1940, 31 U.S.C. 203.

The FAA's evidence showed that the condition that gave rise to petitioners' complaint had existed unchanged since 1966, and thus any taking occurred at that time. To avoid summary judgment, petitioners were required to come forward with specific facts capable of supporting an inference that the alleged taking had occurred during the period of their ownership of the subject property. See *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 159-161 & nn.19, 20 (1970). As both courts below correctly concluded (Pet. App. 3a-4a, 7a), petitioners failed to carry that burden.

Since the decision of the court of appeals on this very narrow factual issue is plainly correct and conflicts with no decision of any other court,[3] further review by this Court is unwarranted.

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[3]All three cases relied upon by petitioners (Pet. 5-11) deal with the problem of determining the date of taking when the government's conduct imposes an increasing burden on the plaintiffs' properties. See *United States* v. *Dickinson*, 331 U.S. 745, 746-747 (1947); *Klein* v. *United States*, 152 Ct. Cl. 221, 222-224, cert. denied, 366 U.S. 936 (1961); *Petersen* v. *Port of Seattle*, 94 Wash.2d 479, 485 618 P.2d 67, 71